of it by the offeror, the question of whether the option was a mere naked offer or a binding promise to keep the offer open should be deemed immaterial in the determination of whether or no specific performance of the new contract should be granted.[28] Such acceptance creates a new contract, either bilateral or unilateral according to the terms of the offer.[29] The specific performance of this contract should be dealt with separately, in accordance with the rules just discussed.[30]

These questions assume a new interest because of the recent New York case of *Dittenfass* v. *Horsley* (App. Div., 1st Dept., 1917, 56 N. Y. L. J. 2195) where the court, with one judge dissenting, follows the rule supposed to have been laid down by the Court of Appeals in *Levin* v. *Dietz*[31] and *Wadick* v. *Mace*.[32] The defendant and one Selznick had entered into a contract of option which in substance provided for the sale of certain stock upon the payment of a stipulated purchase price. No place for the acceptance of the option was named except in a supplementary agreement. The plaintiff, an assignee of the rights under the contract of option, attended the place named in this supplementary agreement, willing and able to perform, but the optionor did not appear. A bill for specific performance was filed, the plaintiff tendering the purchase price to the court. In denying relief, the court stated that, even if there had been a proper acceptance of the option, (a fact which the court denied) specific performance could not be granted, since there was a lack of mutuality inasmuch as the plaintiff, as assignee, had assumed no obligations under the contract. Such a statement is in conflict with the weight of authority and seems to disregard the principles explained above.

RIGHT OF CARRIER TO SUE FOR FREIGHT AFTER SURRENDER OF LIEN.—A carrier in possession of goods under authority of the owner has a lien thereon for its transportation charges,[1] but where the goods are voluntarily surrendered without payment or are not of sufficient value, when sold, to satisfy the lien, the carrier may sue for the amount of freight remaining unpaid. The cases are clear that such freight may, under various circumstances, be collected from either the consignor or the consignee,[2] but the reasons underlying the liability of each are different. The consignor is liable, and some courts hold him "*prima*

---

[28]W. G. Rees Co. *v.* House (1912) 162 Cal. 740, 124 Pac. 442; Donahue *v.* Potter & George Co. (1901) 63 Neb. 128, 88 N. W. 171.

[29]Ross *v.* Parks (1890) 93 Ala. 153, 8 So. 368; Black *v.* Maddox, *supra,* note 25. The tendency of the courts has been to call the new contract bilateral. See note 8, *supra.*

[30]Wilson *v.* Seybold (D. C. 1914) 216 Fed. 975; Black *v.* Maddox, *supra,* note 25. It is to be noticed that a purchaser from the optionor, who takes with notice of the contract of option, takes subject to it. Copple *v.* Aigeltinger, *supra,* note 25.

[31]*Supra,* note 9.

[32]*Supra,* note 9.

[1]2 Hutchinson, Carriers (3rd ed.) § 864.

[2]See Central of Ga. Ry. *v.* Birmingham Sand & Brick Co. (1913) 9 Ala. App. 419, 64 So. 202; Coal & Coke Ry. *v.* Buckhannon River etc. Co. (W. Va. 1915) 87 S. E. 376.

facie liable",[3] because he was the original contracting party, and, as such, undertook to pay the freight charges in all events.[4] As a proposition of contract, this would, of course, be true whether the consignor were the owner of the goods or not.[5] It seems obvious that any agreement between the consignor and the consignee as to who should pay the freight, can not interfere with the contractual right of the carrier against the consignor.[6] Furthermore the shipper is not released from his liability by the fact that the carrier surrenders the freight to the consignee without demanding payment.[7]

Where the facts are sufficient to establish a relationship of principal and agent between consignee and consignor,[8] the consignee also ought to be liable for the freight charges as an undisclosed principal. But though the courts almost universally allow a recovery from the consignee, it is not under the doctrine of undisclosed principal, but generally on the theory that the consignee, by receiving the goods from the carrier with the knowledge that the carrier is thereby giving up its lien, makes a new and independent promise, implied in fact, to pay the cost of transportation, whether the goods are covered by bill of lading[9] or not.[10] Where, however, the consignee is only the agent

---

[3]Baltimore etc. Ry. *v.* New Albany Box & Basket Co. (1911) 48 Ind. App. 647, 94 N. E. 906; see Central R. R. of N. J. *v.* MacCartney (1902) 68 N. J. L. 165, 52 Atl. 575.

[4]Coal & Coke Ry. *v.* Buckhannon River etc. Co., *supra*; Jelks *v.* Philadelphia & Reading Ry. (1913) 14 Ga. App. 96, 80 S. E. 216. The ordinary consignment in such cases is between a vendor and vendee of goods, and since, in the absence of a manifestly contrary intention, the title passes to the consignee upon delivery to the carrier, Williston, Sales, § 282, the vendee is often considered as an undisclosed principal contracting with the carrier through his agent, the vendor. *Cf.* 10 Columbia Law Rev. 568; 3 Hutchinson, *op. cit.* § 1317. This might well be the case whenever the consignee has previously authorized the shipper to make the consignment for him. Even under this theory, the agent consignor could be held for the freight, by the ordinary rules of undisclosed agency. Cincinnati etc. Ry. *v.* Vredenburgh Sawmill Co. (1915) 13 Ala. App. 442, 69 So. 228.

[5]See Portland Flouring Mills Co. *v.* British & Foreign Marine Ins. Co. (9 C. C. A. 1904) 130 Fed. 860.

[6]Baltimore etc. Ry. *v.* New Albany etc. Co., *supra*.

[7]Coal & Coke Ry. *v.* Buckhannon River etc. Co., *supra*. The somewhat common phrase in bills of lading, "consignees paying freight", is construed, in general, merely as protecting the carrier by confirming its lien, Coal & Coke Ry. *v.* Buckhannon River etc. Co., *supra*, and is held not to preclude it from also looking to the consignor for payment, see Portland Flouring Mills Co. *v.* British & Foreign Marine Ins. Co., *supra*; 2 Hutchinson, *op. cit.* § 808, though some courts have considered the phrase important in fixing liability on the consignee. See Union Pac. R. R. *v.* Stickel Lumber Co. (1916) 99 Neb. 564, 156 N. W. 1082.

[8]See note 4, *supra*.

[9]Cornelius & Co. *v.* Central of Ga. Ry. (1915) 13 Ala. App. 533, 69 So. 331; see St. Louis S. W. Ry. *v.* Gramling (1911) 97 Ark. 353, 133 S. W. 1129. Though such an undertaking might well be implied from the fact that the consignee took possession of the goods from the carrier, N. Y. N. H. & H. R. R. *v.* York & Whitney Co. (1913) 215 Mass. 36, 102 N. E. 366, such implication would not follow as a matter of law. *Cf.* Sanders *v.* Vanzeller (1843) 4 Q. B. 260.

[10]Hatch *v.* Tucker, Swan & Co. (1880) 12 R. I. 501.

of the shipper and this fact is within the knowledge of the carrier, no separate liability is incurred by the agent;[11] but where such relationship is not known to the carrier, the consignee is bound, apparently as the agent of an undisclosed principal.[12] Moreover, the consignee's liability should not, despite judicial opinion *contra*,[13] be made to depend on whether he actually had title to the goods shipped or not, especially since the carrier ought to be allowed to rely on the presumption that title is in the consignee,[14] if no facts appear to rebut that presumption. Likewise an agreement between vendor and vendee that the former should pay the freight, ought not to interfere with the carrier's rights against the latter if he is the consignee.[15]

The question of liability as to freight very often arises in cases where the carrier erroneously charges a rate lower than the schedule prescribed by the Interstate Commerce Commission permits. Such undercharges are illegal, and the carrier not only has the right, but is under a legal duty, to recover the balance of the prescribed charge.[16] By the great weight of authority, therefore, the carrier will not be estopped as against either the consignor[17] or the consignee[18] from recovering the legal rate, although a lower charge was originally agreed upon.

What are the rights of the carrier when the consignee endorses the bill of lading to a third party while the goods are in transit? It would seem that in such a case under the general doctrine the consignee ought not be liable for the freight since he never receives the goods from the carrier.[19] The endorsee, however, upon obtaining the goods, is in the same position as the vendee of goods to whom a bill of lading made out to the order of the consignor as vendor has been endorsed, in which case the vendee is clearly liable.[20] In England, a statute specifically provides that the endorsee of a bill of lading shall be liable for freight.[21] Even apart from statute, the courts have

---

[11]St. Louis, S. W. Ry. *v.* Gramling, *supra*; see Cornelius & Co. *v.* Central of Ga. R. R., *supra*.

[12]Pennsylvania R. R. *v.* Titus (1915) 216 N. Y. 17, 109 N. E. 857; N. Y. N. H. & H. R. R. *v.* York & Whitney Co., *supra*.

[13]See note 4, *supra*.

[14]Central of Ga. Ry. *v.* Southern Ferro Concrete Co. (1915) 193 Ala. 108, 68 So. 981. And it has been held that since this presumption does not obtain where the bill of lading is made to the order of the vendor with a provision therein to notify the vendee, the vendee will not be held on an implied contract. Union Pac. R. R. *v.* Stickel Lumber Co., *supra*.

[15]Central of Ga. Ry. *v.* Birmingham etc. Co., *supra*.

[16]See N. Y. N. H. & H. R. R. *v.* York & Whitney Co., *supra*; Union Pac. R. R. *v.* Stickel Lumber Co., *supra*.

[17]Baltimore etc. Ry. *v.* New Albany etc. Co., *supra*.

[18]Central of Ga. Ry. *v.* Birmingham etc. Co., *supra*; N. Y. N. H. & H. R. R. *v.* York & Whitney Co., *supra*; *contra*, Central R. R. of N. J. *v.* MacCartney, *supra*.

[19]Tobin *v.* Crawford (1842) 9 M. & W. *716. Under the theory of undisclosed principal, he would probably remain still liable. So also under the beneficiary doctrine. See note 22, *infra*.

[20]Sanders *v.* Vanzeller, *supra*; *semble*, Davison *v.* City Bank (1874) 57 N. Y. 81.

[21]18 & 19 Vict. c. 111 [1855]; see Sewell *v.* Burdick (1884) 10 App. Cas. 74.

imposed such a liability on the endorsee;[22] and Mr. Williston, who maintains the opposite view,[23] is not fully borne out by modern authority.

That the liability of the consignor and the consignee depend on entirely different legal principles becomes of large importance under certain circumstances. Thus in the recent case of *Yazoo & M. V. R. R.* v. *Zemurray* (5 C. C. A. 1917) 238 Fed. 789, the court, after admitting that generally the carrier may sue either party, stated, by way of *dictum,* that if the carrier, through error, demands and receives less than the regular freight from the consignee, it can not thereafter, "change its base and proceed against the consignor," for the balance. Such a position seems to disregard the fact that the liabilities of the two are utterly independent, and based on totally different principles. The case is clearly out of line with the weight of authority.[24]

[22]N. Y. N. H. & H. R. R. *v.* Sampson (1916) 222 Mass. 311, 110 N. E. 964; see Tobin *v.* Crawford, *supra*; 2 Hutchinson, *op. cit.* § 808. Especially is this so where the bill of lading says "consignee or assigns paying freight". See Trask & Davis *v.* Duvall (U. S. 1821) 4 Wash. C. C. 181. The carrier might be allowed to sue the endorsee of a bill of lading on the theory that it is the beneficiary of a promise made by the endorsee to the endorser to pay the freight charges. The beneficiary doctrine might also be invoked in favor of the carrier against the consignor, where the consignor has promised the consignee to pay the freight. The converse of this would likewise be true. But there is no authority sustaining the rights of the carrier in any situation on the ground of beneficiary contracts.

[23]Williston, *op. cit.* § 426.

[24]On the precise facts of the principal case, Baltimore etc. Ry. *v.* New Albany etc. Co., *supra,* was decided *contra.*